

The 2004 Constitution and Shariah: Examining Legal Tensions in Afghanistan

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Abstract

The 2004 Constitution of Afghanistan (2004 Afghan Constitution) was made based on the Bonn Agreement which required the Afghan government to establish an Afghan legal framework in collaboration with the international community. It led to the incorporation of different sources of law such as Shariah, the constitution, and international human rights standards without reconciling the contradictory concepts that undermined the position of the Afghan 2004 constitution due to its inconsistency with Shariah. With this problem in consideration, this study attempts to identify sources of law by focusing on the role of Shariah in case of conflict between constitutional provisions. It seeks to specify the supreme source of law by addressing the hierarchy of constitutional norms to pave the way for filling the legal gap. To achieve this objective, the research uses the doctrinal method of elaborating constitutional provisions to discover the supreme source of law. The researcher analyses the legal authority of the 2004 Afghan Constitution under constitutional provisions that introduce conflicting sources of law. In addition to this, the 2004 Afghan Constitution does not fully subject itself to Shariah while aligning law with Shariah. It provides a distinct meaning of constitution and law which resulted in weakening the position of Shariah compared to other sources of law. However, the 2004 Afghan constitution treats its provisions to be binding while providing provisions contrary to Shariah which is established under irrevocable provision. Hence, the constitutional gap might be filled by enacting a new constitution under the supremacy of Shariah.

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Introduction

After the 9/11 attacks on the United States of America (USA) in 2001, the USA rapidly launched military operation and collapsed the Islamic Emirate of Afghanistan in collaboration with the Northern Alliance of Afghanistan, by December 2001: (Vorobej, 2009, p.29). Subsequently, the United Nation held conference in Bonn, Germany to map out the legal and political framework for the future of Afghanistan. At the end of the conference, international and national stakeholders who were involved in the case of Afghanistan such as the USA, Russia and others, as well as several Afghan factions except Taliban signed an agreement titled “Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions” : (Alexander, 2006, p. 559). It is commonly referred to the Bonn Agreement which played a vital role in shaping the legal system of Afghanistan after 2001: (Mark & Romasha, 2020, p. 9). According to Article 2 of Bonn Agreement the 2004 constitutional framework should be formed under Islamic principles, international standards, the rule of law, and Afghan legal traditions. Based on this, Afghan government, with the assistance of the international community made significant political and legal changes.

Among them, one of the most significant legal changes was the enactment of the 2004 Afghan Constitution which is built upon five principles, i.e., Islam, unitary state, democracy, rule of law, and human rights (Moschtachi, 2012, p. 685). These constitutional principles especially the principles of Islam, democracy, and human rights provide several provisions, among others, on the source of law which revealed the self-contradictory theory observed in legislative and judicial attestations: (Roder, 2017, pp. 220-221). Therefore, the sources of law under the 2004 Constitution of Afghanistan are derived from the Bonn Agreement according to which the 2004 Afghan Constitution has provided four sources, i.e., *Shariah*, democracy, human rights, and the constitution itself, which form the legal system of Afghanistan: (Rasekh, 2017, pp. 193-194). Among them, *Shariah*'s relationship with democracy and human rights is heatedly debatable as they are perceived to be incompatible in some areas. This is because the international community led by the USA made it clear to the Afghan government that international standards were their red lines and should be incorporated into the fabric of the 2004 Afghan Constitution.

According to this, due to the role of Western countries as financial supporters or occupiers, the Afghan government was obliged to consider their recommendations in the constitutional-making process, resulting in conflicting sources of law in the 2004 Afghan Constitution that drew criticism from legal experts: (Mahmoudi, 2004, p. 876).

Some commentators asserted that the 2004 Afghan constitution which is firmly Afghan-made can be considered completely an Islamic constitution based solely on the fact that *Shariah* is its primary source of law. At that particular point of time, there was a need for international cooperation to create a new constitution as the constitution-making process would not been possible without international support: (Ghizaal, 2020, p. 16). By contrast, other such as Taliban claim that foreign countries commanded by the USA interfered in the 2004 Afghan Constitution to the extent that it was entirely copied from foreign constitutions that consider no principles of Islam:(Rubin, 2020, p. 7). Consequently, it is essential to specify the supreme source of law by exploring the legal references as the 2004 Afghan Constitution provides different sources of law under the principles of Islam, human rights, and the rule of law.

Research Questions

- What factors contributed legal tensions in the making-process of the 2004 Constitution?
- What is the extent of legal contradictions between *Shariah* and other sources of law in the 2004 constitution?
- Which source of law takes precedence in the event of conflict in 2004 Constitution?

Research Objective

- To determine the key factors that played role in contributing legal tensions in the 2004 Constitution.
- To examine the extent of inconsistency between *Shariah* and other sources of law in the 2004 Constitution.
- To identify the supreme source of law in the case on conflict in the 2004 Constitution.

Literature Review

The Bonn Agreement is often considered a milestone in shaping and developing sources of law for the Afghan legal framework after 2001. Although it remains a significant subject for Afghans, literature on the compatibility between the different sources of law in the 2004 Afghan Constitution is scarce. Most of the literature is focused on international involvement in the constitution-making and implementation process: (Rubin, 2004, pp. 5-9). Likewise, most of the literature only discusses the development of international human rights standards in the new constitution: (Nawabi, 2003, p. 2). It is difficult to find literature to establish a link between several sources of law in the 2004 Afghan Constitution. Politicians in Afghanistan, have deliberated on this issue in line with their interests and attached the recognition of foreign involvement to their official positions. Legal Experts have diverse perspectives. Hence, this research thoroughly reviews the available literature related to the issue to determine sources of law by explaining the correlative constitutional provisions, specifying the supreme source of law in the 2004 Afghan Constitution. International organizations' reputed reports narrowly represent the cooperation of the international community in the 2004 Afghan Constitution-making and implementing process without discussing its influence on the sources of law under the constitutional framework. They illustrated that nearly all Western countries were involved in making the constitution either directly or indirectly: (International Crisis Group, 2013; International Commission of Jurists, 2014; North Atlantic Treaty Organization, 2020).

They spent millions of dollars to rebuild the rule of law in Afghanistan but the 2004 Afghan Constitution has not been implemented: (United Nations Human Rights, 2020). It is contradicted by Rebecca R Moore who described NATO's partnership with the Afghan government as seen in the implementation of 2004 Afghan Constitution: (Moore, 2021, p. 9). Still, some scholars noticed that establishing the Afghan government was in conflict with the provisions of the constitution when it had been created under the name of national unity through the agreement between Dr, Ashraf Ghani, and Abdulullah Abdulullah through the mediation of USA foreign minister, John Kerry: (Lecturers of Universities, 2019).

This literature discussed the financial support and interference of foreign countries in the constitution-making and implementation process while this research focuses on the sources of law which are established in

the 2004 Afghan Constitution. Another group of literature focused on the position of the *Shariah* and the 2004 Afghan Constitution. Matin Lue noted that *Shariah* as a source of law is firmly incorporated into the fabric of the 2004 Afghan Constitution: (Lue, 2016). In contrast to this, Mohammed Abas Stanikzay, a prominent member of the Taliban, said Afghanistan needs to make a new constitution based on *Shariah*: (Moscow Conference, 2020). Additionally, Mir Hermatullah Sadat addressed the 2004 Afghan Constitution refers to international human rights standards: (Sadat, 2004, p. 49). The current research aims to analyse the hierarchy of sources of law under provisions of the 2004 Afghan Constitution, with the purpose of identifying the supreme source of law to apply in the case of conflict—something that has not been elaborated deeply so far.

Research Methodology

This study is a document-based data and research which follows a qualitative research methodology that is conducted through major library research and an empirical study. Accordingly, it employed comparative and analytical approaches with a combination of doctrinal and non-doctrinal methods. It exposes the theoretical and applied dimensions of the legal norms relating to the sources of law. These legal norms as mainly found in the constitution, law, and Bonn agreement are explored.

As the sources of law under the 2004 Afghan constitution is the issue of controversy among Afghan people, references to newspapers and speeches, are also used. In addition,

In the form of books, Journals, conference proceedings, reports, and newspaper articles relevant to the sources of law under the 2004 Afghan Constitution are used among secondary sources while the research generally relied on primary sources such as the 2004 Afghan Constitution and the Quran for the *Shariah*.

Findings

In elaborating the past research related to the subject of this study which is the 2004 Constitution of Afghanistan: A Disputed Source of Law. The researcher will divide this subject into five subtopics: Contradiction between the Principle of *Shariah* and Democracy, The Contradiction between the Principles of *Shariah* and Human Rights, Identifying the Supreme Source of Law in the Case of Conflict, Different Meanings of the Constitution and Law, Different Positions of *Shariah* in Judiciary.

Contradiction between the Principle of *Shariah* and Democracy

The 2004 Afghan constitution introduces a political system under the Islamic Republic, Islam as the official religion of the state, and Islamic principles and beliefs as a source of law in articles 1,2, and 3 respectively. To keep the current position of Islam, the 2004 Afghan Constitution reinforces Islamic principles by considering the relevant articles as irrevocable provisions in Article 149. Otherwise, the sovereignty of the people is explicitly adopted in the first clause of Article 4 of the 2004 Afghan Constitution which established the principle of democracy by stating that “National sovereignty in Afghanistan shall belong to the nation, manifested directly and through its elected representatives”. It seems that due to the strong relationship between the aforementioned provisions, they shall be read together to define the real aspect of the Islamic Republic of Afghanistan. Article 1 of the 2004 Afghan Constitution introduces Islamic Republic as system of government by declares that “Afghanistan shall be an Islamic Republic, independent, unitary and indivisible state”, while Article 4 establishes the principle of democracy under the concept of people’s sovereignty by which people shall govern the government: (Rose Leda Ehler et al., 2013, p.8).

Article 1 provides no additional detail about the Islamic Republic’s nature and composition as it is nearly presumed that the Islamic Republic of Afghanistan does not need elaboration (Kamali, 2008, p. 283). The phrase the “Islamic Republic” is a compound term. Linguistically, the term Islam means “Peace, surrounded, and Submission to the will of Allah (SWT)” and the term Republic means “the people, the public, the mass”: (Zubaida, 1988, p. 5). Constitutionally, in Afghanistan, the word Republic was incorporated in Article 20 of the 1977 Constitution to replace the monarchy with the Republic during the reign of Duad Khan for the first time: (Anwari, Book Store, 1973). After four decades of war, to guarantee the Islamic identity of the **constitutional order, *Loya Jirga*,¹ (grand assembly), adopted the Afghan political system as the Islamic Republic in the 2004 Afghan Constitution: (Hashimzai, 2012, p. 667).** Technically, the Islamic Republic has been defined in different ways depending on the social conditions and cultures of countries that recognise such a political

¹ Loya Jirga which is a traditional political institution is considered the highest manifestation of the people of Afghanistan. The 2004 Constitution of Afghanistan, 2004(Art. no 110 of 2004).

system. Hence, the Islamic countries perceived Islamic Republic to be aligned with their political and legal goals. for example, Iran uses the Islamic Republic in terms of the form of government which shall be governed by sovereignty of Allah (SWT): (Shirazi, 1997, p. 92-96.).

By contrast, the 2004 Afghan constitution uses the Islamic Republic in terms of the form of government which shall be governed by the nation: (The Constitution of Afghanistan, Act, 4, 2004). It implies that the 2004 Afghan Constitution upholds the Islamic Republic under the idea through which the people's will shall be regarded as the main source of law: (Raji, 2015, pp. 17-2). Similarly, the phrase "national sovereignty belongs to the nation" refers to the authority to enact and implement law without external interference: (Danish, 2010, pp. 179-180). Although the incorporation of the principle of "national sovereignty belongs to the nation" in Article 4 of the 2004 Afghan Constitution was perceived to be recommended by Western countries, they violated it in order to form Afghanistan's National Unity Government after the presidential election in 2014: (Jalali, 2015). Following this, both Mohammad Ashraf Ghani and Abdullah Abdullah, two leading candidates, claimed that they had won. The USA played a vital role in creating the Power Sharing Agreement through which Mohammad Ashraf Ghani and Abdullah Abdullah became president and chief executive in that order. Hence, the USA involvement should be seen as unconstitutional and disrespectful as it did not respect the electoral result from the perspective of Afghan voters: (van Bijlert, 2016, p.2).

Moreover, the concept of people's sovereignty contravenes Article 3 of the 2004 Afghan constitution which declares that "No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan". This provision firmly represents *Shariah* as the main source of law: (Rasooli, 2012, p 38). *Shariah* focuses on the sovereignty of Allah, a concept contrary to the sovereignty of the people (Kayadibi, 2022, p. 80). This view is unanimously confirmed by Afghan *Shariah* Scholars, to the extent that the Afghan government could not take out the sovereignty of Allah from the textbooks of the Afghan Universities by enforcing Article 4 of the 2004 Afghan Constitution. For instance, in the textbook titled Political System of Islam, written by Abdul Majid Samim, it is firmly emphasised that sovereignty belong to Allah and it is explained that national sovereignty belong to the nation is an inconsistent concept with *Shariah* (Samim, 2017, p. 143). The common belief would be contradicted if the 2004 Afghan Constitution concentrates on the sovereignty of the people as Article 2 stipulates that "The sacred religion of Islam is the religion of the Islamic Republic of Afghanistan. Followers of other faiths

shall be free within the bounds of the law in the exercise and performance of their religious rituals”. The above text affirmed that the framers of the 2004 constitution were aware of the religious demographics of Afghanistan, which represents that about 99 percent are Muslims although a particular Madhab “Islamic school” as the official Islamic school of the state has not been offered in Article 2 of the 2004 Afghan Constitution, in contrast to this it was mentioned in its equivalent clauses in the most previous Afghan constitutions (The constitutions of Afghanistan, Act 2,1 and 2 of 1923, 1932 and 1964 respectively).

The Contradiction between the Principles of *Shariah* and Human Rights

With regard to human rights, the tension between constitutional provisions is emerged from the unconditional incorporation of international human rights standards in the 2004 Afghan Constitution. Following the Bonn Agreement, Afghanistan has become a signatory of several international conventions that protect human rights but it has faced challenges in enforcing them due to their inconsistency with *Shariah* in some areas related to freedom of religion and others. (Haneef, Zin & Mahmud, 2016, p. 132). Among them, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is one of the most debatable instruments, adopted by the Afghan government without any reservations in 2003. CEDAW was adopted by General Assembly resolution 34/180 of 18 December 1979 and entered into force in 1981: (CEDAW, Art 27 of 1979). Afghanistan which was among the signatories of CEDAW in 1980 ratified it in 2003: (Farhoumand-Sims, 2009, pp. 136-137).

To be sure, the 2004 Afghan Constitution is referred to UDHR and all international treaties to which Afghanistan has joined. Article 7 of the 2004 Constitution describes that “The state shall observe the United Nations Charter, inter-state agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights”. According to this provision, the Afghan government is committed to fulfilling the requirements of these international treaties including UDHR. Their provisions, for example, the provisions which regulate family relationship as per equal responsibilities might be inconsistent with *Shariah* and *Shariah*-based Afghan domestic laws as Article 17 of the 1977 Civil Law of Afghanistan which is based on *Shariah* explicitly represents that “...husband shall have to pay alimony, even if wife dwells in her relatives’ residence...”. The above text shows that the imperative responsibility of the

husband is to provide his wife with alimony “Nafaqa”. It shall depend on the ability of the husband in line with Article 118 of the 1976 Civile Law of Afghanistan’.

Surely, Article 18 of the UDHR, for instance, states that “thought, conscience, and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance. worship and observance”. The text focuses on the unlimited freedom of religion including the conversion from Islam to another religion which is commonly known as apostasy in the legal context of Afghanistan. Legal experts, for example, Rassekh Afshar elaborated that the apostasy is criminalised by neither the provisions of the 2017 Penal Code nor the 2004 Afghan constitution: (Rassekh Afshar, 2006, p. 594). By contrast, Article 2 of the 2017 Penal Code of Afghanistan in line with 130 of the 2004 Afghan Constitution declares that “(1) This law regulates the Taziri crimes and penalties. (2) Perpetrators of *Hudud*, *Qisas* and *Diat* shall be punished in accordance with the provisions of Hanafi jurisprudence of Islamic *Shariah*”.

It indicates that the characterization of crime under the legal system of Afghanistan shall be discussed under both the law and Hanafi Fiqh to discourse the real aspect of the cases. Therefore, this provision explicitly determines the scope of the 2017 Penal Code of Afghanistan which applies to Taziri crime while referring to Hanafi Fiqh regarding *Hudud*, *Qisas*, and *Diat*. Taziri crimes refer to a group of crimes for which the punishments are determined by a Judge or ruler: (Zaker, 2009, p. 18). They are defined by the 2007 Penal Code in Afghanistan, unlike *Hudud* crimes which refer to fixed crimes with prescribed punishments in *Shariah*. *Qisas*, and *Diat* generally refer to retributive justice and compensation made by the offenders or their families: (Anwarullah, 1995, p. 28) Based on this, Apostasy is considered to be a part of fixed crime (*Hudud*) and punishable with the death penalty in the Afghan legal context: (Zaker, 2009, pp. 18-20).

Identifying the Supreme Source of Law in the Case of Conflict

As the 2004 Afghan constitution introduced *Shariah*, Democracy, and international human rights standards as sources of law without harmonizing the conflicting ideas, it is necessary to provide further detail as to whether these sources of law are assigned in either distinct or equal positions. legal experts mostly mentioned that the main source of the 2004 Constitution is

Shariah in line with Article 3 which describes the principles and beliefs of Islam as a source of law: (Rasooli, 2017, pp,12-28). On the contrary, the 2004 Afghan Constitution provides a variety of provisions that weaken the role of *Shariah* by limiting terms in the text accordingly. It indicates that Islamic principles and beliefs in Article 3 of the Afghan Constitution can generally be referred to *Shariah* as a source of law while the terms law and *Shariah* are restricted in Articles 94 and 130 sequentially. These provisions illustrate a clear distinction between law and constitution, as well as between the positions of *Shariah* in the national assembly, and the judiciary as follows.

Different Meanings of the Constitution and Law

Article 94 of the 2004 Afghan Constitution declares that “Law shall be what both houses of the National Assembly approve and the President endorses, unless this Constitution states otherwise. In case the President rejects what the National Assembly has approved, the President shall send it back, within fifteen days from the date it was presented, to the House of People mentioning the reasons for rejection, and, with expiration of the period or if the House of People re-approves it with two-thirds of all the votes, the draft shall be considered endorsed and enforceable”. The text before use shows that the law generally refers to what the Parliament approves and the president endorses unless this 2004 Afghan Constitution states otherwise. It is a comprehensive definition of law in Afghanistan: (Danish, 2010, p. 42). The phrase “unless this constitution states otherwise”, refers to procedures provided by the 2004 Afghan Constitution, which shall be applied in the case of disagreement on the enactment of law either between parliament and the president or between both houses of National Assembly.

In this case, the constitution provides further provision in Article 94, based on which, the draft shall be considered ratified either with the expiration of the period or with re-approval by the People’s House with an absolute majority. Sometimes, the law shall be what the House of People re-approves with two-thirds of all the votes if the president has rejected the enactment of the National Assembly. Law is sometimes the enactment of the National Assembly which would be neither endorsed nor rejected by the president within fifteen days from the date it was presented: (The Constitution of Afghanistan, Art 94 of 2004). Likewise, Article 100 of the 2004 Afghan Constitution represents that “If one House rejects decisions of the other, a joint commission comprised of an equal number of members from each House shall be formed to solve the difference. The decision of

the commission, after endorsement by the President, shall be enforced. If the joint commission does not solve the difference, the decision shall be considered rejected. In such situation, the House of People shall pass it with a two-thirds majority in its next session. This decision, without submission to the House of Elders, shall be promulgated once endorsed by the President”.

The above text shows that the final decision on approval of shall be made by the National Assembly: (Hasami, 2018, p. 23). Article 90 stipulates that “ The National Assembly shall have the following duties: 1. Ratification, modification or abrogation of laws or legislative decrees; 2. Approval of social, cultural, economic as well as technological development programs; 3. Approval of the state budget as well as permission to obtain or grant loans; 4. Creation, modification and or abrogation of administrative units; 5. Ratification of international treaties and agreements, or abrogation of membership of Afghanistan in them; 6. Other authorities enshrined in this Constitution”. On the contrary, the 2004 Afghan Constitution was approved by Loya Jirga in line with the preamble and Article 162. For example, the preamble of the 2004 Afghan Constitution mentioned that “We the people of Afghanistan...Have, herein, approved this constitution in accordance with the historical, cultural and social realities as well as requirements of time through our elected representatives in the Loya Jirga, dated January 3, 2004, held in the city of Kabul”. Additionally, the constitutional amendment shall also be under the authority of Loya Jirga in line with Article 111 which states “The Loya Jirga shall convene in the following situations: 1. To decide on issues related to independence, national sovereignty, territorial integrity as well as supreme national interests; 2. Amend provisions of this Constitution; 3. Impeach the President in accordance with the provisions of Article Sixty-Nine of the Constitution”. It is highly important to mention that there are no records showing a constitution to be approved by the National Assembly in the history of the Afghan legal system. All Afghan constitutions indicated that they have been approved by Loya Jirga: (Danish, 2019, p. 18-21). It seems that *Shariah* is a main source of law except the constitution for the National Assembly which has not the authority to enact the constitution: (The Constitution Art 90 of 2004). As a result, it is argued that the principles and beliefs of Islam are the basic source of law not the constitution in Afghanistan. Therefore, it firmly confirms that the law and constitution have distinct concepts within the 2004 Afghan Constitutional Framework but these terms seem to be undisclosed to legal experts who

consider *Shariah* as the main source of the 2004 Afghan Constitution: (Azimi, 2020, p. 212).

Different Positions of *Shariah* in Judiciary

Article 130 of the Afghan Constitution cited the hierarchy of the constitutional norm by considering that “In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws. If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner”. The text required courts to resolve cases according to provisions of the constitution and law. If the provisions were not found, the courts should then refer to Hanafi Fiqh. Based on this, *Shariah* which is used in terms of Hanafi Fiqh in the Judiciary of Afghanistan is considered a subsidiary source of law: (Saeed, 2022, pp 65-78). The position of Hanafi Fiqh as a gap-filling law in courts limited the supreme position of *Shariah* as the main source of law enshrined in Article 3 of the 2004 Afghan Constitution.

It shows that the 2004 constitution declares Islamic principles as a source of law and Hanafi Fiqh as a subsidiary source of law but the constitution depends on neither Islamic principles nor Hanafi Fiqh: (Faizan et al., 2024, p. 248). This view is supported by Article 62 of the 2004 Afghan Constitution which states that “This Constitution shall be enforced from the date of approval by the Loya Jirga, and endorsed and proclaimed by the President of the Islamic Transitional Government of Afghanistan. Upon the enforcement of this Constitution, laws and legislative decrees contrary to its provisions shall be invalid”. The text prioritizes the constitution over the law and legislative decree. It clears up any doubt about the binding character of the constitution. Therefore, Article 62 invalidates any laws which are inconsistent with the constitution, even if they have been established based on *Shariah* in line with Article 3 of the 2004 Afghan Constitution: (Grote, 2004, p. 912) It focuses on the supremacy of the constitution over the law and *Shariah* which is also confirmed in Article 121 of the 2004 Afghan Constitution which declares that “ At the request of the Government, or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law”.

This provision authorizes the Supreme Court to use the constitutional norms as standards for legislation in Afghanistan. The

outcome of the above provisions are supremacy of the principles of democracy and human rights over *Shariah* in the case of conflict as *Shariah* is referred to as the law which shall be established under the provisions of the constitution, and the principles of democracy and human rights are kept within the constitutional framework as the main provisions of the 2004 Afghan Constitution: (Moschtachi, 2012, p. 694). To keep such a position, Article 49 of the Afghan constitution shows that “The principles of adherence to the tenets of the Holy religion of Islam as well as Islamic Republicanism shall not be amended. Amending fundamental rights of the people shall be permitted only to improve them. Amending other articles of this Constitution, with due respect to new experiences and requirements of the time, as well as provisions of Articles Sixty-Seven and One Hundred Forty-Six of this Constitution, shall become effective with the proposal of the President and approval of the majority of National Assembly members”.

It seems that the 2004 Afghan constitution has divided its provisions into three categories: the provisions which focus on *Shariah* are irrevocable, the provisions which are referred to human rights can be amended conditionally, and other provisions that are revocable. Based on this, Loya Jirga is disqualified to amend the constitutional provisions on *Shariah* such as Article 3 which determines *Shariah* as a source of law or Article 130 which regards Hanafi Fiqh as a subsidiary source of law while the legal gap and ambiguity can be widely detected in their texts. The formal declaration of Islamic principles as irrevocable provisions can be considered a fitting attribute to the vagueness of the constitutional provisions: (Kamali, 2008, p. 286). By contrast, the 2004 Afghan Constitution has attempted to uphold the constitutional provisions under the principle of democracy and human rights, even those that are incompatible with *Shariah*. It supports the provisions which emphasis democracy and international human rights standards by considering them equal to the constitutional provisions. These provisions localized and gathered around the principle of democracy and Human rights by the recommendation of the international community: (Larson, 2009).

According to Articles 4 and 7, the Afghan government is required to prioritize the sovereignty of the Afghan nation and the provisions of UDHR and other international treaties to which it has joined, over the provisions of *Shariah* in the 2004 Afghan Constitution. However, it has made Islamic principles the basis for law which shall not be contrary to the constitution in accordance with articles 121 and 162. It shows that *Shariah* and constitution are the basis for law in equal position at the same time which constitution itself is regarded as high-ranking legal provisions rather

than law. This means that law shall be in a lower ranking than the 2004 constitution: (Azimi, 2020, p. 212)).

For this purpose, the constitutional provisions are regulated in such a way that the 2004 constitution introduce political and legal system in its highest position under Islamic principle in Articles 1 and 3 respectively, but weakens it by referring Islamic republic to the sovereignty of people, restricting Islam as source of law which does not include constitution and introducing Hanafi Fiqh as subsidiary source of law. Yet, the 2004 constitution keeps the vital position of the principles of the democracy and human rights by considering them either in equal position with *Shariah* as the basis for legislation or in the high level more than Hanafi Fiqh: ((Worsi, 2020, pp. 69-88). It is for courts to solve cases by considering when the provisions are not found in the constitution and other law in article 130. Likewise, the constitution points to end the applicability and effectiveness of Islamic norms by not mentioning *Shariah* and giving the authority to supreme court to review and interpret the law for their compliance with the constitution in Article 121: (Finkelman, 2005, p. 2).

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Conflict of Interest

The authors declare that they have no conflict of interest.

Conclusion and Recommendation

To sum, according to this research, the 2004 Afghan Constitution can be considered a conflicting framework for sources of law. Some constitutional provisions that describe democracy and human rights are contrary to Islamic Principles, recommended by western countries led by the USA who are seen so in 2004 constitution due to their involvement in the process either as financial supporters or as occupier. Without reconciliation of conflicting ideas, the constitution gives democracy and human rights a

status of supremacy over other sources of law in the case of conflict. The supremacy of the 2004 constitution over Hanafi Fiqh, or referring to Islamic principles as a source of ordinary laws not the constitution, keeps the position of international element significant. The balancing of conflicting law in compliance with constitution, which is defined as higher ranking legal instrument, can be regarded as the root cause of conflict between constitutional provisions as it weakens the position of *Shariah*.

This is so because neither the term law is defined comprehensively to include the constitution nor *Shariah* is established as a highest standard for the compliance of all laws in a judicial review. Additionally, the 2004 constitution places the final nail on the coffin of the Islamic principle by providing constitution as standard for the compliance of law and establishing Islamic principle as source of law except the constitution. It seems that the advocates of the 2004 constitution have read Article 3 without taking Articles 94, 100, 111 and 162 which formally define the law and the 2004 constitution into consideration. Likewise, the supreme court has not been given the authority to reconcile the inconsistency between constitutional provisions under one general theme that *Shariah* shall prevail over other laws and shall be void to the extent of inconsistency. Therefore, the conflict between international elements and Islamic principle considered the main reason for the lack of a constitution at present in the country and it is impossible to be harmonized by amending the constitution due to irreversibility of constitutional provisions relating to Islamic principle. It could be essential for new government to enact new constitution based on the Islamic norms and *Shariah* based-Afghani values.

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